

2019-20

LEGISLATOR'S GUIDE to the Issues

Constitutional Policing

The Issue

Liberty is a guiding principle for the Texas Public Policy Foundation. Protecting the pursuit of liberty and other constitutional freedoms is a critical mission for our nation's peace officers. But many outside the ranks assert confidence of the police in this role has fallen. Militarization, lack of transparency, and overcriminalization often surface as contributing to distrust.

Police are told they are at war—on crime, drugs, and terrorism. This has fueled an increase in militarization. Chiefs and sheriffs have introduced armored personnel carriers, high-powered rifles, and combat-style uniforms to their ranks. Citizens could easily mistake their protectors for an invading army. Little transparency exists in the process for obtaining equipment, or for its use. Paramilitary-style SWAT teams have increased as a result. Training and tactics for these units is untethered unless by individual department policy. Statewide tracking of actual deployment of SWAT or the use of their military-style gear is nonexistent. Protective gear such as helmets and vests is not at question. Personnel carriers, grenade launchers, and the like are where concern lies.

Situations occur requiring special weaponry and procedures, but a fine line exists that must be monitored where teams are otherwise deployed. Police sometimes need special weapons and tactics (SWAT) in some situations, but there is a fine line between necessity and common practice. Citizen liberties—those protected by our Bill of Rights—can easily suffer collateral damage from roughshod “battle” tactics. Many police officers fashion themselves as warriors. A “warrior mindset” represents a human survival drive and a will to win. This is important when lives are on the line. But the title must be worn with care because it also embodies an infringement to liberty our Founding Fathers fought against in revolutionary times. In fact, the oft-overshadowed Third Amendment represents more than a prohibition to quartering soldiers. To colonists it symbolized the aversion to soldiers with weapons of war policing their communities.

Excessive and unnecessary laws are coupled with militarization. Both lead to questionable police tactics and certainly alter public trust. Committing a traffic violation—any violation—can be grounds for citations and related fines. A police officer can also make an arrest for even the most minor of infractions if they so choose. State statute and case law affirm this latitude. A simple warning is allowed, but this is at the officer's discretion. Many assert traffic stops are a gateway to detecting other violations or for seizing property and money. An unbridled officer can stop car after car looking for drugs and cash, but only at a cost to those simply commuting from place to place.

Traffic enforcement is meant to educate the public, reduce accidents, and save lives. Constant enforcement for simple infractions, however, fosters distrust and creates an atmosphere of animosity, especially in minority communities. Legitimacy of au-

thority and acting justly can powerfully affect a citizen's choice to follow the law. Yet officers lacking the capacity or desire to exercise good discretion can cause this to come crashing down.

Indisputably, a law enforcement focus—a mission—is necessary in our society. But “mission over liberty” should never pilot the course.

The Facts

- SWAT team formation, training, equipment procurement, and deployment criteria are not regulated or monitored by the state.
- Local law enforcement, including school district police departments, currently possess or can readily obtain military equipment such as armored personnel carriers and high-powered weapon systems. Requirements for transparency in its planned use, actual use, or costs for upkeep are few.
- Chapter 14 of the Texas Code of Criminal Procedure authorizes peace officers to arrest without a warrant for offenses within their presence or view. Offenders can be stopped and jailed for minor violations, including traffic infractions at the discretion of a police officer even if the category of the offense does not carry a custodial sanction.
- The Fourth Amendment clearly outlines a warrant preference for seizure of persons. An affidavit and prior judicial review is required for an arrest warrant but not for warrant field arrests where the officer makes a probable cause decision.
- Broad arrest authority for peace officers was affirmed in the United States Supreme Court's ruling in *Atwater v. City of Lago Vista*.
- Most Texas police officers have little training in search and seizure law or in the exercise of discretion beyond that which is required in the basic police academy.

Recommendations

- Require greater transparency in the use of equipment procured from military sources, including the related costs for upkeep.
- Regulate SWAT team formation, training, and deployment criteria to comport with public liberties and constitutional protections.
- Require tracking of SWAT deployments by police agencies, including outcomes from the related situations.
- Require the Texas Commission on Law Enforcement to establish more comprehensive training for basic police academy programs and for incumbent officers focused on the better understanding of the principles of liberty, the use of discretion, and the protections afforded citizens under the Fourth Amendment.

continued

Resources

Rise of the Warrior Cop: The Militarization of America's Police Forces by Radley Balko, New York: Public Affairs, 2013.

Militarizing the American Criminal Justice System by Peter Kraska, Boston: Northeastern University Press, 2001.

[Final Report of the President's Task Force on 21st Century Policing](#), Office of Community Oriented Policing Services (May 2015).

